BOOK REVIEWS


Prof Dr Ulrike Müßig, presently the Dean of the Faculty of Law at the University of Passau, needs no introduction amongst legal historians in Europe and locally. The topics of her research interests and publications vary from European constitutional history (twelfth to the twenty first century) to contemporary European legal history; history of the legal integration in Europe and Roman-canon law of succession, to name but a few. The second edition of her monograph on judicial authority and a legal historical comparison of the role of the legally competent or lawful judge (“gesetzlicher Richter”) from canon law to the European Convention on Human Rights (ECHR) was published in 2009. This second edition contains new legal developments, such as a discussion on the impact of the Constitutional Reform Act 2005 in the United Kingdom (which brought to an end the judicial role of the House of Lords as the highest appeal court in the United Kingdom). This act also provides for the creation of a new Supreme Court outside Parliament, with the Law Lords as the first Justices of the new Supreme Court (in the process losing their seats in the House of Lords).

The concept of “Justizhoheit” – corresponding with the English terms of judicial authority/jurisdiction/sovereignty/supremacy/independence – revolves around the fundamental idea of a court of law as a pre-established entity which is functionally independent and impartial. A pre-established court (eg, established by law, with judge(s) governed by law) protects against any discretion when a case is heard.

The introduction of the monograph explains the legal question, the context of the topic, the methodology, structure of the monograph and concludes with a detailed explanation of the relevant primary and secondary sources consulted.

The book itself is divided into three parts. Part 1 provides the legal-historical context by exploring the concept of a legally competent or lawful judge in canon law and in early France, England and Germany. Part 2 complements Part 1 by investigating more closely the (uncodified) constitutional principles of the rule of law and parliamentary sovereignty, as well as the structure of the court system in modern English law. This is followed by a discussion of the statutory requirement of the legality of all state action,
the unwritten constitutional guarantee that evolved from the general principle of equality and the structure of the court system in modern France. An analysis of internal court procedure regarding the composition of the benches and the allocation of cases in both the United Kingdom and France is added thereto. Finally, Part 3 analyses the topic against the backdrop of recent developments in the constitutional framework of the European Union following the entry into force of the Treaty of Lisbon and how the guarantee of the legally competent judge finds expression under relevant provisions of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

Part 1 traces the legal historical development of the guarantee of a legally competent or lawful judge starting with canon law and by examining the difference between ordinary and extra-ordinary judges, the latter based on the function of justice as the *ordo iudiciarius* contained in the *Decretum Gratiani*. In contrast to classical Roman procedure which did not explicitly recognise any plea of lack of jurisdiction, medieval canon law recognised that parties to legal proceedings had to be protected against lack of procedural irregularities, laying the foundation for the recognition of judicial competence as procedural guarantee. The notion of judicial impartiality, made possible by judicial independence, took hold and through emerging procedural rules for judicial inquiry, the concept of judicial jurisdiction (sovereignty/authority/supremacy) was developed. This development coincided with the earliest ecclesiastical courts.

Part 1 also addresses the legal-historical development of judicial authority in France, followed by a discussion of the same in England and Germany. The discussion of the position in France reveals that although the *juges naturels* (judges predetermined by law) is not a specific constitutional guarantee in the *Déclaration des Droits de l’Homme et du Citoyen* of 1789, the foundation was laid by prior developments such as the sixteenth-century opposition against royal judicial commissions and the abolition of feudal privileges. In contrast, the discussion of the position in England shows the centralisation of justice in the form of the common law displacing local customs, already achieved in the twelfth century and facilitated by the adaptation of Anglo-Saxon customs after the Norman conquest in 1066. Royal prerogative could not prevail in the central common-law courts, the Court of King’s Bench, the Court of Common Pleas, and the Court of Exchequer. The monarch’s power, however, was exercised through politically dependent commissioners in the Star Chamber, the Court of High Commission and in the Court of Chancery. With the abolition of the Star Chamber and the Court of High Commission in 1641, common law gained strength over royal prerogative. Common law was seen to provide a guarantee of predictability, whereas the royal prerogative was exercised at the discretion of the monarch. Through the precedence of common law over royal prerogative, the supremacy of law in the history of English law ensured and entrenched the independence of ordinary judicial jurisdiction. It bars the monarch from personally exercising judicial power (except in the rulings of the Court of Chancery).

The legal-historical position in Germany differs from that of France and England, mainly as a result of a lack of a strong central power. The right to be heard by a competent judge determined by law found expression as a result of early jurisdictional conflict following the emancipation of the territorial sovereigns from the Holy Roman Empire.
after the Treaty of Westphalia. The discussion reveals that early constitutional provisions regulating access to lawfully constituted courts did not grant *a priori* rights of freedom restricting monarchical sovereignty, but should rather be viewed as an expression of the monarch’s self-commitment to rule by law. Kant’s philosophy fuelled liberal literature emphasising the constitutional guarantee of legally competent judges, culminating in the concept of the separation of powers in the nineteenth century. The royal prerogative was bound by the regulation of the judicature, expressed in article X § 175 of the German Imperial Constitution of 1849 and finally in article 101, paragraph (2) of the Basic Law of 1949.

A comparative reading of these developments at the end of Part 1 of the monograph shows a common European constitutional tradition of legitimate or legally competent judges and legal protection against judicial interference. Despite the procedural and other differences between a common-law and a civil-law system, the comparison shows that in England, despite the fact that no specific provision exists providing for the guarantee of legally competent judges, constitutional principles such as the rule of law and the principle of parliamentary supremacy, and the requirement that new courts be established by statute, provide a similar protective effect to the relevant provisions in the civil-law systems that protect against the arbitrariness of the royal prerogative. The authority created by the historical continuity of the common law provided fertile soil for the development of the concept of judicial independence in England.

Modern constitutional law is the focus of Part 2 of the monograph. With meticulous accuracy and comprehensiveness, the author explores judicial authority in England and France by critically analysing, *inter alia*, the composition and structure of the relevant courts (Germany is excluded here, as the German position is comprehensively discussed in Part 1). It appears from the discussion that there is no European consensus as far as the internal court organisation relating to the allocation of cases and the composition of benches are concerned. In contrast to the German Basic Law that bans extraordinary courts and provides that no one may be removed from the jurisdiction of his or her lawful judge (art 101, par (1)), English courts do not apply general abstract rules for the composition of a bench or the allocation of cases.

Part 3 of the monograph turns to the European Convention on Human Rights, specifically article 6, which guarantees the right to a fair trial by an independent, impartial judicial tribunal, established by law. Article 6(1) of the Convention and its application and interpretation by the European Court of Human Rights is discussed in great detail. (It is interesting to learn that 64 per cent of violations found by the Court since its inception concerns art 6 (right to a fair hearing). See the official website of the European Court of Human Rights at [http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/](http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/) (5 Oct 2010).) With the Treaty of Lisbon as well as that of Protocol 11 having entered into force in December 2009, significant changes were made to the constitutional landscape of the European Union and the manner in which cases under the European Convention and the Charter of Freedoms are adjudicated. Part 3 carefully considers the possible consequences of these changes for the topic under investigation.
In an annex to the monograph, the author discusses the creation of the new Supreme Court of the United Kingdom and the arrangements that modified the Office of Lord Chancellor, as well as very recent legislative developments in the regional context.

The brief summary above touches only on the surface of this comprehensive, well researched and relevant monograph. The extensive list of references at the end of the monograph is impressive and includes an update of references from 2002 to 2009. Brief summaries of the monograph in English, Spanish and French facilitate access to the voluminous contents of the monograph. These summaries, unfortunately, focus mainly on Parts 1 and 2 of the monograph.

In conclusion, *Recht und Justizhoheit*, in its second edition, will undoubtedly continue to provide an outstanding, comprehensive and very relevant scholarly contribution, welcomed not only by researchers, scholars and students working in the fields of legal history, constitutional history and comparative constitutional law, but by the general legal community in Europe and elsewhere. The monograph underscores the conclusion that despite the procedural differences between civil- and common-law systems, similar objectives are obtained in different ways; arriving at the same result *via* different methodologies.

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